

**SANITIZED DECISION – 05-635 MFE – BY ROBERT W. KIEFER, JR., ALJ –
SUBMITTED for DECISION on FEBRUARY 28, 2006 – ISSUED on AUGUST 23, 2006**

SYNOPSIS

MOTOR FUEL EXCISE TAX – DIVERSION PENALTY – TAXPAYER’S FAILURE TO CARRY BURDEN OF PROOF -- The failure of the taxpayer to articulate adequate grounds in its petition for reassessment justifying its claim, combined with its failure to appear at a hearing and to present any evidence respecting its claim, will result in a denial of relief to the taxpayer. See W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003)

FINAL DECISION

On November 15, 2005, the Tax Unit Supervisor of the Internal Auditing Division of the West Virginia State Tax Commissioner’s Office (“the Commissioner”) issued an assessment for a diversion penalty respecting the motor fuel excise tax against the Petitioner. This assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 14C of the West Virginia Code. The assessment was for the period ending October 31, 2005, for a diversion penalty in the amount of \$. Written notice of this assessment was served on the Petitioner.

On November 17, 2005, the Tax Unit Supervisor of the Internal Auditing Division of the Commissioner’s Office issued a second assessment for a diversion penalty respecting the motor fuel excise tax against the Petitioner. This assessment was also issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 14C of the West Virginia Code. The second assessment was also for the period ending October 31, 2005, and was for a diversion penalty in the amount of \$. Written notice of this assessment was served on the Petitioner.

Thereafter, by mail postmarked December 5, 2005, received in the offices of this tribunal, the West Virginia Office of Tax Appeals, on December 8, 2005, the Petitioner timely filed a petition for reassessment. W. Va. Code §§ 11-10A-8(1) [2002] and 11-10A-9(a)-(b) [2002].

At the time scheduled for convening the evidentiary hearing, there was no appearance on behalf of the Petitioner. The evidentiary hearing was held, however, without an appearance on behalf of the Petitioner, in accordance with the provisions of W. Va. Code § 11-10A-10(a) [2002] and W. Va. Code. St. R. § 121-1-69.1 (Apr. 20, 2003).

FINDINGS OF FACT

1. In its petition for reassessment, the Petitioner asserted that it does everything possible to comply with any and all state law and regulations, that no damage was done to the State of West Virginia because all taxes were paid, and that the only violation was that the diversions were filed late.

2. In its petition for reassessment, the Petitioner admitted that it was notified that the grace period respecting compliance with the motor fuel excise tax provisions was ending as of October 14, 2005.

3. In its petition for reassessment, the Petitioner asserted that the diversions were for partial loads of fuel leaving West Virginia; the partial loads consisting of the fuel remaining in its trucks after the Petitioner had filled its customers' fuel tanks.

4. In its petition for reassessment, the Petitioner asserted that since it was assessed it has taken steps to prevent this problem from happening in the future.

5. In its petition for reassessment, the Petitioner asserted that the assessments are excessive considering the number of gallons that were involved, as compared to the number of gallons that the Petitioner ships to West Virginia and the fact that there was no harm to the State of West Virginia because all tax due was paid.

6. The grounds articulated by the Petitioner are inadequate to show that the assessment is erroneous, unlawful, void or otherwise invalid.

7. The Petitioner was provided with notice that it was required to appear at the evidentiary hearing and present evidence respecting the reasons it believed that the assessment was erroneous, unlawful, void or otherwise invalid.

8. The Petitioner did not appear at the time and place of the hearing and presented no evidence respecting any of its allegations.

CONCLUSIONS OF LAW

Based upon all of the above it is **DETERMINED** that:

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that the assessment of the diversion penalty against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

2. The Petitioner in this matter has failed to carry its burden of proving that the assessment of the diversion penalty against it is erroneous, unlawful, void or otherwise invalid.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the two motor fuels excise tax diversion penalty assessments issued against the Petitioner for the period ending October 31, 2005, in a total amount of \$, should be and are hereby **AFFIRMED**.